

Olivier Beaud

**THE FOUNDING CONSTITUTION
REFLECTIONS ON THE CONSTITUTION OF A FEDERATION AND ITS PECULIARITY**

D'une telle Constitution [fédérative], on peut dire qu'elle a, non seulement d'un point de vue politique mais aussi juridique, les deux natures, légale et contractuelle¹.

The question which gave rise to this Conference and to a book I am writing, is how we should think the constitution of the Federation, that is to say, the specific political entity that is, at least in our view, neither a State nor an Empire. Thus formulated, the question seems purposeless, indeed absurd, in the light of the great mass of jurisprudence that bases its reasoning on the architectonic distinction between the Federal State and the Confederation of States or Confederacy. The jurisprudence repeatedly lays down that the constitution organises the Federal State whereas the treaty is the legal basis for the Confederacy. Thus, the reigning opinion sees no problem in the constitution of a Federation since the federal constitution is the legal basis of the Federal State in the same way as a unitary constitution is the basis for a unitary State.

In other words, the federal constitution is of the same nature as a unitary constitution, being the supreme law governing both these political entities. Our challenge is to reason differently, and question this binary scheme of the federal constitution and the confederal treaty. We will endeavour to think the Federation without having recourse to the « state centred » concepts of modern public law, and thus think the constitution of a Federation as if it were a federative Constitution that here we will call the federative compact (*Bundesvertrag* in German), at least until we consider the English translation later on in this introduction.

In this regard, today's conference in a way goes further than our book *Théorie de la Fédération*². We shall therefore return briefly to that book so that our audience will be able to understand the presuppositions underlying today's discussion³. In the book we tried to defend the idea that, alongside

¹ J.-F. AUBERT, « Notion et fonctions de la Constitution », in D. THÜRER, J.-F. AUBERT, J.P. MÜLLER (dir.), *Verfassungsrecht der Schweiz. Droit constitutionnel suisse*, Zürich, Schultheiss, 2001, p. 8 [« Of such a [federative] Constitution it may be said that it has, not just from a political but also from a legal point of view, both legislative and contractual characteristics »].

² O. BEAUD, *Théorie de la Fédération* [2007], Paris, PUF, 2nd ed., 2009.

³ We do not have time here to examine the criticism this theory has elicited from colleagues interested in the same subject, and who are mostly non-French (in general, French jurists are not interested in the federal issue). However, we would like to draw the reader's attention to the criticism of Hugues Dumont, who sees a flaw in our work, which he deems to be

the State and the Empire, a third type of political entity existed: the Federation. The peculiarity of the federation is that it is criss-crossed by lines of tension. They result first from the fact that it is a political unit comprising other political units, the federated member States, which are the States having agreed to confederate, while at the same time maintaining their own political existence. Secondly, the Federation represents the synthesis of two contradictory moments: becoming the result of a union of States, and yet being an institution independent of those States. Finally, even its objectives are contradictory, since it is supposed to defend on the one hand common goals (security and prosperity), and on the other, the autonomy of the member States. The purpose of the book was therefore to demonstrate the existence of the Federation's constitutional autonomy, because it would be wrong to dismiss it as merely a Federal State. The two theses relating to this theory of Federation were negative: the first played down the notion of sovereignty⁴ to help understand the federal phenomenon, and the second, for the same reason – since sovereignty is the distinguishing criterion applicable – excluded the *summa divisio* between the Federal State and the confederacy of States⁵ which seems to be more an obstacle than a way of thinking federalism in terms of law.

However, in *Théorie de la Fédération*, we decided not to go into detail about the federative compact designed as a juridico-political instrument of the Federation, that is to say the equivalent of the federative constitution. It is such an important issue that it cannot be merely glossed over⁶. Insofar as we agree that the Constitution is the status of the modern State, *what then can be the equivalent for a Federation?* The classic answer, stemming from the opposition between the two federative forms (Federal State and Confederacy) and already mentioned above, is twofold, but we must repeat that in a Federal State it is a so-called federal *Constitution* whereas in a Confederacy it is a so-called confederal *treaty*. In the former, the federal constitution is an act of domestic public law, while in the latter, the confederal treaty is an act of international public law. Federalism is therefore based on two completely opposed legal acts.

Now, what we propose is different: all Federations rely on a *constitutional compact* that is known as a *federative compact*. In other words, this compact seems to be the proper way, in legal terms, to think the relation between the idea of a Constitution and that of a Federation understood as a political form. In the same way that there is a single federative type, which entails rejection of the opposition between the Federal State and the Confederacy as identification of federalism, so also there must be a single legal act structuring the Federation. In other words, the federative constitution – that

merely a theory of Confederacy, such that, far from having eliminated the old distinction between the federal State and the Confederacy, we have merely modernised it.

⁴ See chapter I of O. BEAUD, *Théorie de la Fédération*, *op. cit.*, p. 39-65

⁵ See *Ibid.*, chapter II, p. 66-91.

⁶ In 2005-2006 – the date the previous book was written – we wrote four chapters on the question of the constitution of a Federation. Thus we did not evade the question but we were forced to relinquish publishing them because the book was already too voluminous.

is, the federative compact – enables the classic distinction between the federal constitution and the confederal treaty to be done away with. Insofar as it underlines the originating nature of the legal foundation of a Federation, the federative compact is an illustration, among others, of how specific the federal phenomenon is. Its unique feature is that it is a *constitutional compact* the purpose of which is to establish, to « constitute » a Federation. We must now set forth the reasons for this shift, both semantic and conceptual, from the federal constitution to the federative compact.

Why should the federative constitution be designated as the federative compact? It is now necessary to justify using the expression « federative compact », which in fact is not used in neither today's French legal language nor today's English legal language. Originally, the reason we introduced this term into the discussion was our collaboration in translating Carl Schmitt's treatise on constitutional law (*Verfassungslehre*). This uses the expression *Bundesvertrag*⁷, which is a cross between the notion of a constitutional compact (*Verfassungsvertrag*) and that of a federal constitution (*Bundesverfassung*)⁸. It was deemed judicious to translate *Bundesvertrag* by the expression « federative compact »⁹. The translation is not an obvious one, judging from certain examples taken from works on the history of the Swiss Confederation that analyse the Swiss Constitution of 1815. The original expression, in German, of *Bundesvertrag*, is sometimes translated, oddly, by « contract of alliance », or again by « *convention of alliance* »¹⁰. Obviously, this literal translation means absolutely nothing to a lawyer. When translating the word « *Bund* », in a legal context obviously, the federal idea must be kept, and the original theological idea, meaning alliance in German, ignored. Furthermore, the word « *Vertrag* » should not be translated by either contract or treaty. This is because the word « contract » is too close to the civil law notion in French, while the word « treaty » is too close to international law. Indeed, if *Vertrag* had been translated here by « treaty », it would have been a misunderstanding of Schmitt's intention of giving a constitutional dimension to the expression, since he clearly wished to distinguish between the compact and the international treaty (*völkerrechtliche Vertrag*). Thus the word compact enabled the terminological trap of the word treaty to be avoided.

⁷ O. BEAUD, *Théorie de la Fédération*, *op. cit.*, p. 197.

⁸ *Ibid.*, see here Chapter 7 II and ff. (p. 197-208) for the constitutional compact applied to the Federation, and Chapter 29. II, 1 to II, 3 for the federative compact (p. 513-515).

⁹ I later returned to the issue of this translation in the article « La notion de pacte. Contribution à une théorie constitutionnelle de la Fédération », H. MOHNHAUPT, J.-F. KERVÉGAN (dir.), *Liberté sociale et contrat dans l'histoire du droit et de la philosophie*, Francfort, Klostermann, 1997, p. 197-270, from which the following passages have taken much inspiration.

¹⁰ The first translation was made by Mrs Jules Favre and is found in K. Daedlinker's work *Histoire du peuple suisse*, Paris, Baillière, 1870, p. 257, and the second by W. Rappard in his master work: *La constitution fédérale de la Suisse*, La Baconnière, 1948, p. 34. The translation is literal, because the noun *Vertrag* can be translated by both contract and convention and the word *Bund* which is used as an adjective or attribute can always be translated by alliance, not least with God, as seen earlier.

Unfortunately, the English fell precisely into that trap, the authors translating « *Bundesvertrag* » by « federal treaty »¹¹ or by « federal contract »¹² or « federation contract »¹³, as did Schmitt's American translator, Jeffrey Seitzer, who nevertheless did a remarkable job. He also translated the German expression « *Verfassungsvertrag* » by « constitutional contract ». It seems to us that both these translations of « *Vertrag* », in this constitutional context, by the word « contract », detract from the originality and partly the meaning of the notion of « *Bundesvertrag* » as used by Schmitt and part of the German doctrine. It should not be forgotten that Schmitt probably took the idea of a constitutional compact (*Bundesverfassung*) and federative compact (*Bundesvertrag*) from the French jurist Maurice Hauriou. The latter, who had a non-formal and non-positivist conception of the Constitution, re-introduced the expression « constitutional compact » into the vocabulary of constitutional scholars, noting in his Manual of constitutional law that many French constitutions resulted from a « compact » or agreement between the various political players¹⁴. However, he did not apply this idea of a compact to federal matters. It was Carl Schmitt who did that, in his *Constitutional Theory*. The genealogical analysis of the concept « *Bundesvertrag* » then favours the idea that « *Vertrag* » should not be translated by « contract ».

Given this both linguistic and conceptual difficulty, we propose to use the English expression « federal compact » to designate this federative constitution or *Bundesverfassung*. The word « compact », applied to the idea of constitution, may seem daring, not to say sacrilegious, in the United States, recalling as it does the constitutional theory of John Calhoun, the South Carolina jurist and politician who developed the intellectual arguments to justify secession of the southern states. He opposed the compact and the constitution the better to justify the resistance of the southern states against the federal authorities and the Supreme Court, and ultimately to legitimise not only breach of a simple contract but also secession (dissolution of the compact). It is therefore understandable that the word « compact », which had led to civil war, was a taboo for American politicians and constitutional lawyers. However, the word « compact » does indeed feature in the Constitution of the United States to describe the agreements between the member states (« any Agreement or Compact », Art. I, Sect. II, cl. 3). This word, as we shall see, is used by other English speaking jurists (Dicey for instance) to describe the founding act of a Federation. It is indeed extremely interesting that during the discussions surrounding the formation of Federations

¹¹ This is what Bardo Fassbender does in a passage where he compares the idea of an « international » constitution with that of a federal constitution. He notes that the German doctrine uses *Bundesvertrag* and he translates it by « federal treaty » (B. FASSBENDER *The United Nations Charter as the Constitution of the International Community*, Boston, Nijhoff, 2009, p. 63).

¹² *Ibid.*, § 7, p. 114

¹³ *Ibid.*, § 29, II,2, p. 383. Seitzer translates also « *Verfassungsvertrag* » by « constitutional contract ». *Ibid.*, § 7: Constitution as a Contract, p. 11, p 114.

¹⁴ Voir M. HAURIOU, *Précis de droit constitutionnel*, Paris, Sirey, 2^e éd, 1929.

federacies created subsequently to the American Civil War, such as the Canadian Federation and the Australian Federal Republic, the notion of « compact »¹⁵, and not that of « constitution » emerged to describe the act founding a Federation. Merely from this semantic instance we can see that the simple fact of presenting a non-American theory of federalism to American jurists may, because of language issues, cast doubt on linguistic usages that also lead to thought reflexes. However, there is no question of a « Calhoun renaissance » because the purpose of this theory of the federative compact is not to re-found the Federation on a contractual basis. The idea behind these developments is that of an institutional compact (*Statusvertrag*, in Schmitt's words), that is, a compact that is neither a law nor a contract, or, if you prefer, both a law and a contract.

If the word « compact » fails to pass the anti-Calhoun barrier of prejudice, there is still the English word « covenant » that could be used to translate the German « *Vertrag* ». « Covenant » is the word used to describe the compact of the Society of Nations, which German jurists call « *Völkerbund* ». With its theological resonance, the word « covenant » is startlingly similar to the German « *Bund* », and Daniel Elazar considered it as the fundamental concept of American federalism, that which best described its protestant roots¹⁶. That being said, whether we choose the English words « compact » or « covenant », their common feature is their contractual connotation, the idea of the « *foedus* », a contractual type of relationship that is the origin of political power¹⁷. A Federation arises from the agreement between States that confederate to create a new political entity.

However, in the expression federative compact, the adjective « federative » seems as important to us as the noun « compact ». If we decide to stick to the expression federative compact, it is in conscious opposition with the dominant use by international lawyers, especially Georges Scelle, of the expression « *federal compact* ». If we use the adjective « federative », we can distinguish between « federal » and « federative » and so avoid the constant confusion of federal with federal State. We have explored this distinction in more detail in our *Théorie de la Fédération* where we endeavoured to associate the word Federation with the adjective « federative », and the word federation (with a small « f », which designates the federal instance of

¹⁵ N. ARONEY, *The Constitution of a Federal Commonwealth (The Making and the Meaning of the Australian Constitution)*, New York, Cambridge University Press, 2009, p. 426.

¹⁶ See D. Elazar's four books: *The Covenant Tradition in Politics*, New Brunswick, Transactions Publishers, 1995-1998. In fact, in his view, the connotation of Covenant was chiefly biblical, corresponding to the alliance between God and the people of Israel.

¹⁷ « The tie that binds all these is foedus; this is the heart of the matter. Whatever its institutional mutations in history, it is the primary cell of all relationships wherever individuals, families, tribes, communities, societies, nations have come together to promote both personal and common interests. It knows no degrees; it is indifferent to forms, it is blind to everything but the promise of communality and individuality, and to this it demands fidelity. Without this, there can be no association, no cooperation, no treaty, no leagues, no constitution » (D. RUFUS, *The Federal Principle. A Journey through time in Quest of a Meaning*, Berkeley, University of California Press, 1978, p. 215-216).

the Federation) with the adjective « federal »¹⁸. It should be noted that, in English too, some authors use the adjective « federative » to designate the federal entity, what describes the Federation¹⁹. This in a way confirms our intuition that « federative » should be separated from « federal ». By using the word « federative », we open up the possibility of making a firm distinction between the Federation and the Federal State, and we can then begin to « de-statify » most of the concepts relating to theory of the Federation.

We can therefore now sum up our intellectual plan to think the politico-legal basis of a Federation differently. By designating the constitution of any Federation as a federative compact, or again as a federative constitutional compact, we wish to indicate, first, that the Federation is an autonomous political institution and second, that the legal act instituting or founding it is a constitution, the originality of which is that it is based on an initial agreement, a free and deliberate union. The Federation cannot be based on force or constraint. It is the result of a free contract between the States (II). However, a federative compact like this is also characterised by a specific, uniquely federative content, which distinguishes it from the unitary constitution. In the constitution of a Federation there are provisions that do not exist in a State constitution because of the specific, triangular structure of a Federation: Federation/member-States/individuals, with the member-States being pivotal in this relationship (III).

I. RE-THINKING THE CONSTITUTION OF A FEDERATION AND ITS LEGAL QUALIFICATION

Although there are many works on federalism, there are very few on the constitution of a Federation. It is a striking feature of the literature on federalism. To take but recent examples, three works will suffice to illustrate this absence of interest in the federative constitution. A large volume, *The Ashgate Research Companion to Federalism*²⁰, was published in Canada in 2009, and, surprisingly, in this interesting and erudite book, the reader will search in vain for thoughts on what the constitution of a Federation might be. This, however, is not a good example because the editors of the book were not jurists. Well, in that case, let us turn to the very imposing German treatise in four volumes published by Springer in Germany in 2012. This is edited by a jurist who is a professor of German public law. The title indicates its encyclopaedic ambitions: *A Handbook on Federalism: Federalism as a Democratic Legal Order and Legal Culture in Germany, Europe*

¹⁸ O. BEAUD, *Théorie de la Fédération*, op. cit., chap. 4.

¹⁹ This is the case of I. JENNINGS: « Indeed, some of the South American federal republics have at times approximated to this system, though they have been more dictatorial than *federative*. » (*A Federation for Western Europe*, New York, Cambridge University Press, 1940, p. 17).

²⁰ A. WARD & L. WARD, *Federalism, The Ashgate Research Companion to Federalism*, Champion College Canada, Ashgate, 2009.

*and the World*²¹. Indeed, it begins by a volume entirely devoted to the *Foundations of Federalism and the German Federal State*²². Yet, in this vast sum of knowledge, there is not even an article on the (federative) Constitution. Yet again, in Vicki Jackson's admirable synthesis on federalism, published in French in the *Traité international de droit constitutionnel*²³, there is no discussion of the constitution in a Federation.

The same can be said of the literature on the Constitution or on constitutionalism: it would be a fine thing to find a work or even an article specifically devoted to the subject of the federative constitution. The reason for this silence in the jurisprudence is simple: *in the context of the federal State, the federative constitution is most often assimilated to the unitary constitution, and therefore has no specific nature in jurists' eyes, while the act founding a confederacy is considered to be a treaty and therefore falls outside the ambit of the constitution*. It is this prevalent conception, this prejudice, which we will present (A) before suggesting a counter hypothesis, a different federative constitution (B).

A. The Prevalent Conception: Federal Constitution as the Supreme Statute of the Federal State

1. The Antinomy Between Constitution and Contract

We know that the basic premise of federalism is the co-existence on the same territory of two governments, the federal government and the federated governments. Now, this premise is deemed unrealistic by partisans of the State and sovereignty, who claim, like Hobbes for instance, that there cannot be two sovereign powers and that the system expressing the domination of the Leviathan is the law. The contract, on the other hand, is incapable of organising a political society since its clauses are words, promises, and as Hobbes said, only the sword guarantees that the words contained in the legal expressions will take effect.

To some extent, the jurisprudence is mostly in agreement with this opinion, but it expresses it differently. Two converging legal arguments underlie the notion of antinomy between the constitution and the contract. The first is

²¹ I. HÄRTEL, *Handbuch des Föderalismus. Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, Berlin, Springer, 2012.

²² Bd. 1 – *Grundlagen des Föderalismus und der deutsche Bundestaat*. The three further volumes are: Bd. 2 – *Probleme, Reformen, Perspektiven des deutschen Föderalismus*; Bd. 3 – *Entfaltungsbereiche des Föderalismus*; Bd. 4 – *Föderalismus in Europa und der Welt*.

²³ V. JACKSON, « Fédéralisme, Normes et territoires », in D. CHAGNOLLAUD & M. TROPER (dir.), *Traité international de droit constitutionnel*, Paris, Dalloz, 2013, t. 2, p. 5-52. In Section II of this article, the author deals with « federal constitutions and governmental structure » (p. 17 *sq.*) However, he does not discuss the concept of federative constitution, as the use of the plural, of itself, clearly indicates. Nor is it alluded to in the chapter on « Federalism » in V. JACKSON, M. TUSHNET (dir.), *Comparative Constitutional Law*, 2nd ed, New York, Foundation Press, 2006, p. 926-929.

that the *nature of a contract* or a treaty is the basis for judging that it is impossible for a federal constitution to emerge from a treaty (that is, in legal terms, a contract). Thus in the middle of the XXth century the German jurisprudence referred to the maxim « only a contract can result from a contractual agreement²⁴ ».

But it is above all the second argument, that based on the *nature of the constitution*, that we must examine more closely here. As early as the late XVIIIth century, did not Emer de Vattel designate a constitution as a « settlement », a status for the State? Similarly, did not Sieyès declare that a Constitution was « a body of binding laws or [...] nothing²⁵ »? Throughout the XIXth century, the conceptual opposition between a constitution and a contract (or compact) was even more marked. It is very significant, for instance, that in France the word « charter » (*chartre*) and not compact (*pacte*) was used to designate the constitution of the Restoration, to indicate that it had been granted unilaterally by King Louis XVIII²⁶. The first great French work on constitutional law, by Adhémar Esmein confirmed this conception of the Constitution (a legislative one, if you wish) as being antinomic with that of contract. « The written Constitution, being a law, indeed a supreme and relatively entrenched law, should never be subject to repeal save by a new constitutional law, voted in the desired form²⁷ ». Finally, the same evolution can be seen in other countries. In Germany, « the compact (*Vertrag*) has gradually been eliminated from the ambit of constitutional law²⁸ », because the opposition between the Princes and the rising new social classes progressively moved to the floor of the representative assemblies.

We will devote a little more time to the jurisprudence that, in the United States, rejected the notion of « compact » which, as we saw earlier, was discredited by those favouring the rights of the states, in the wake of Calhoun. Their thesis was vigorously combated by Joseph Story in his influential work *Commentaries on the Constitution of the United States*. In it he won-

²⁴ Maxime quoted in G. LIEBE, *Staatsrechtliche Studien*, Leipzig, Rosenberg, p. 17 (quoted in L. LE FUR, *État fédéral et Confédération d'états* [1896], Paris, Éditions Panthéon-Assas, 2000, p. 579).

²⁵ In his *Opinion* on the attributions of the *jury constitutionnaire* – loosely translated as constitutional jury – of 2nd Thermidor an III, quoted in P. BASTID, *Sieyès et sa pensée*, Paris, Hachette, 1939, p. 32.

²⁶ For a recent and enlightening account of this question, see Ph. LAUVAUX, « La technique de l'octroi et la nature de la Charte », *Jus Politicum*, 13, 2015, [<http://juspoliticum.com/La-technique-de-l-octroi-et-la.html>.] See also P. PASQUINO, *Sieyès et l'invention de la constitution en France*, Paris, Odile Jacob, 1998, p. 129 sq.

²⁷ A. ESMEIN, *Éléments de droit constitutionnel français et étrangers*, Paris, Larose, 2nd ed., 1899, p. 383.

²⁸ J. FISCH, « Vertrag », in O. BRUNNER, W. CONZE, R. KOSELLECK (dir.), *Geschichtliche Grundbegriffe* (Historisches Lexikon zur politisch-sozialen Sprache in Deutschland), Klett-Cotta, Stuttgart, tome VI, 1990, p. 951. Voir aussi H. MOHNHAUPT, D. GRIMM, *Verfassung. Zur Geschichte des Begriffes von der Antike bis zum Gegenwart*, Berlin, Duncker u. Humblot, 1995, p. 123-125.

ders what the nature of the American Constitution is: « Is it a compact²⁹? » In other words, is the document we know as the Constitution of the United States actually a contract in legal terms, « a treaty, a league, a contract or a compact³⁰ », or is it something else: « a constitution » and here we must understand a « constitutional law »? Story's « nationalist » thesis is therefore that the 1787 Constitution is legally a constitution and, indeed, a « CONSTITUTION of government³¹ ». He argues that the idea of a true American constitution is incompatible with Calhoun's thesis of a compact. He bases his argument on the idea that a constitution of a political entity like the Union is a unilateral act, a legislative act. Either – he says – the American constitution is a treaty or a compact, or it is a « form of government ». In the latter case, it must be ratified by the entire population and becomes binding on every individual in the same way as any « rule of conduct for the sovereign power³² ». In this case, the constitution is a law like any other law – a rule, albeit a « fundamental law ».

However, when examined more closely, Story's opposition between the constitution and the compact is based on the generic opposition between a rule and a compact, as established by Blackstone. « A constitution is in fact a fundamental law or *basis of government*, and it falls strictly within the definition of law as set forth by Blackstone³³ ». From this classic typology of the unilateral and bilateral forms of the legal act, Story draws a conclusion that is capital for his thesis: The United States Constitution falls into the category of law and not of compact. The main textual argument put forth by Story and indeed all American jurists favourable to the rights of the Union (the Federalists of 1787 and later on the « Nationalists » is the famous Supremacy Clause of Art. VI.2 of the Constitution. Invocation of this clause is deemed decisive solely because it expresses a political necessity, that of the relationship between the constitution and the political society, as acknowledged by Hamilton in issue n° 33 of the *Federalist* and quoted almost entirely by judge Story:

A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

²⁹ Which is actually the title of his chapter III, in J. STORY & E.H. BENNETT, *Commentaries on the Constitution*, t. I, Boston, Little Brown, 3rd ed., 1858, p. 206 sq

³⁰ *Ibid.*, § 308, p. 206.

³¹ *Ibid.*, § 372, p. 253.

³² *Ibid.*, § 349, p. 234.

³³ *Ibid.*, § 339, p. 227. Italics refer to quotation from J. BLACKSTONE, *Commentaries on the Laws of England*, § 339.

In fact, the reason for this thesis that the 1787 Constitution was necessarily a Constitution, that is, a Supreme Law, was essentially a *political and legal* one. In fact, it is based on the idea that the Union is a « form of government », and that only *law* can set up, maintain and preserve such a form of government. This argument repeats the very Hobbesian principle that a political society can only exist where there is a relationship of command and obedience between governors and governed. The law described by Blackstone and Story is the legal instrument by which governors can dominate the governed, even where the law might be created by the people in a republic. The Constitution, defended by Judge Story and earlier by the Federalist authors and Chief Justice Marshall, must necessarily be a law since it is a basis of government. Because it is impossible to found such a society on a contractual basis – no contract can guarantee that the subjects will obey in the absence of a higher third party capable of ordering punishment in the event of disobedience³⁴, the Constitution must be « law » in the legal sense. Of course, it can be a « supreme » or « fundamental » law, or be of « constitutional » force, but first and foremost it is a law, in the sense that it is a unilateral act imposed upon those it addresses, and they are bound by it.

In sum, as Georges Burdeau points out, to admit the idea of such a constitutional compact, « would be to go against the notion of constitution, which can *only be a unilateral act of legislative nature*, imposing itself as the supreme rule over both governed and governors³⁵ ». Thus the very notion of constitution forbids a federal constitution from being envisaged as a constitutional compact, since a constitution is law in its nature and cannot therefore be a contract or, if you wish, a compact.

2. *Because of the Constitution's Nature, the Federal Constitution Is the Same as the Unitary Constitution*

The conclusion of the foregoing is this: the lawyers often prefer to say that the relevant conception is that of the constitution of a federal state, which is, in its nature, identical to a unitary constitution. Such a constitution would then be a written constitution and a supreme *law*. *Because it is statute law, it cannot be a contract*. Accordingly, it is easy to declare that the constitution, like any law, must be *modified* by an amendment or by amendments adopted by a simple or a qualified majority.

The consequence of this conception is that the constitution of a Federation is perceived as having the same legal nature as a constitution of a state. Many examples in the constitutional literature might be chosen, but here in Yale, it seems to me convenient to take the example of James Bryce, an

³⁴ We shall leave aside here the problem of the social contract, which is not – strictly speaking – a contractual technique in the legal sense of the term. In the writings of Hobbes, this social contract is of a particular nature: it is an instituting contract. It literally creates the Sovereign.

³⁵ G. BURDEAU, *Traité de science politique*, tome II « L'État », Paris, LGDJ, 3rd ed., 1980, p. 522.

English author who wrote a book on the US — he is sometimes called the « English Tocqueville » because of this book. But he also wrote a famous Essay on « Flexible and Rigid Constitutions³⁶ ». His purpose was to demonstrate that federal constitutions are « rigid » in nature. It should be remembered that, according to him, the rigidity of a constitution arises not from the difficulty in revising it but from the value of the norm of a rigid constitution, that is to say, « the quality and force of the laws³⁷ ». In States with a rigid constitution, Bryce goes on, « paramount or fundamental law », which is called the constitution, « takes rank above ordinary laws and cannot be changed by an ordinary legislative authority³⁸ ». Yet, when he examines federal examples, Bryce describes the classic phenomenon of the move from Confederation to Federal State, as « the tightening of a looser tie » between various self-governing communities that are already united among themselves³⁹. He wrote:

When external dangers or economic interests have led communities to desire a closer union than treaty, and federative agreements have previously been created, such communities may unite themselves into one nation and give that new nation a government by means of an *instrument* which is thereafter not only to hold them together but to provide for their action a single body⁴⁰.

This instrument of government is none other than the constitution that in Bryce's eyes is technically speaking an improvement over treaty and federative agreements. However, what is most interesting is that he seeks to explain the reason for which the federal constitution needs to be rigid. It is because the constitution, as the supreme federal law, must better safeguard the rights of the member States, and therefore their autonomy. As Bryce says:

This process of turning a League of States (*Staatenbund*) into a Federal State (*Bundesstaat*) is practically certain to create a Rigid Constitution, for the component communities which are so uniting will of course desire that the rights of each shall be safeguarded by interposing obstacles and delays to any action tending to change the terms of their union, and they will therefore place the constitution out of the reach of amendments by the ordinary legislature⁴¹.

There is thus an intrinsic link between a rigid constitution and a federal constitution. The Federal authority must not be able to revise or amend the constitution too easily, since otherwise the autonomy of the member-States in the Federation would be jeopardised and federalism threatened. Accordingly, with a federal constitution, the member states are protected by the Constitution in the same way as individuals in a unitary State are, since it is

³⁶ J. BRICE, « Flexible and Rigid Constitutions » [1884], *Essay III*, in *Studies in History and Jurisprudence*, New York, Oxford University Press, 1901, Vol. 1, p. 124-215.

³⁷ *Ibid.*, p. 131.

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 173.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

viewed as the supreme law that is not only difficult to change but is also binding. The category of rigid constitution includes both the federal constitution and the unitary constitution of modern States. In reality, by analysing the federal constitution *first and foremost* as a rigid one, Bryce necessarily relativises the distinction between a federal and a unitary constitution by subordinating it to his *summa divisio* between flexible and rigid. He does not really take seriously the specificity of the federal constitution and thus he faithfully adheres to the dominant thinking in constitutional law.

In contradiction with this trend, we wish to point out the originality of a federal constitution. It is why we propose to re-define it as a constitutional compact concluded between sovereign States, in sum as a federal compact.

B. Re-defining the Constitution of a Federation as a Federative Compact

It is often said that the Constitution is the rules for the modern State. What, therefore, is the equivalent for a Federation? What we are suggesting is the following idea (already expressed in the introduction): any Federation, of whatever type, is based on a constitutional compact called a federative compact. In other words, this compact appears to be the suitable structure with which, in law, to express the articulation between the idea of a Constitution and that of a Federation understood as a political form. Insofar as it underlines the original nature of the legal foundation of a Federation, the federative compact is one illustration, among others, of the specific nature of a Federation. Such an idea is not entirely new, since it can be found in chapter 7 and chapter 29 of Carl Schmitt's *Constitutional Theory*⁴². It has been taken up by several contemporary German jurists among whom Ernst Wolfgang Böckenförde stands out⁴³. Furthermore, the perceptive French author Émile Boutmy clearly saw the mixed nature of a federal Constitution: formally an imperative act, but at the same time a « treaty between States⁴⁴ ». From a legal point of view, the federative compact is one of those conventions that is original in that it has conventional origins and statutory effects. Not only that, Italian constitutional jurisprudence has also underlined the partly contractual nature of the federative constitution⁴⁵, as indeed

⁴² C. SCHIMTT, *Verfassungslehre* [1938], Berlin, Duncker und Humblot, 1983, § 7, 2, p. 62 sq., § 29, p. 363 sq. [English transl. by J. Seitzer: *Constitutional Theory*, Durham/London, Duke University Press, 2008, p. 62 sq., and p. 314 sq.; French transl. by O. Beaud: *Théorie de la Constitution*, Paris, PUF, 1993, p. 114-115, and p. 385].

⁴³ E.W. BÖCKENFÖRDE, « Geschichtliche Entwicklung und Bedeutungswandel der Verfassung », in E.W. BÖCKENFÖRDE, *Staat, Verfassung, Demokratie*, Frankfurt, Suhrkamp, 1991, p. 39-41.

⁴⁴ It is « dans la forme un acte impératif portant organisation et réglant les attributions des autorités centrales et supérieures ; de ce chef, elle se classe à côté des nôtres. Mais cet acte repose sur un traité entre plusieurs corps politiques, distincts et souverains, s'accordant pour créer et en même temps pour limiter l'État » (E. BOUTMY, *Études de droit constitutionnel : France, Angleterre, États-Unis*, Paris, Plon, 3rd ed., 1985, p. 238).

⁴⁵ S. ORTINO, *Introduzione al diritto costituzionale federativo*, Torino, Giappichelli, 1993.

has Swiss jurisprudence⁴⁶. And in deliberately paradoxical manner, we would like, here in Yale, to emphasise that the common law jurisprudence did not fail to note the contractual aspect of the federative constitution.

Let me begin with a quotation by Albert Venn Dicey which is drawn from the chapter on Federalism in his famous *Constitutional Treaty*:

The foundations of a federal state are a complicated contract. This compact contains a variety of terms, which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. The constitution must be a written document, and, if possible, a written document of which the terms are open to no misapprehension⁴⁷.

Dicey is anything but clear in this description of the legal foundation of a Federation. He airily jumbles up the concepts of federal state and confederacy, and of treaty and constitution, although he uses these concepts as opposites. However, it is worth noticing that he has in mind this idea of a contractual foundation for any Federation. Other more contemporaneous Anglo-American authors do refer to the same idea and are a great help for us. I would use two of them.

The first one, – one of the most interesting authors on Federalism – is Murray Forsyth. In his book *Unions of States*, he states that the union or confederacy is « between the normal intrastate world », ruled by a constitution (a unilateral act) « and the normal interstate world », ruled by a compact. « [The confederacy] is based on a treaty between states, that it so say, on the normal mode of interstate relations, *but it is a treaty the content of which goes well beyond that of the normal treaty*; even those which establish international organisations⁴⁸ ».

What Forsyth demonstrates in this book is that the treaty creating a Confederation has a far greater scope than a mere international treaty: it is a « constituent contract⁴⁹ ». He thus contradicts the charter setting up the SDN or the UNO or even a simple treaty of alliance (like that for NATO). In another article, he goes into the legal nature of the compact founding a Confederation. He offers the qualification of « constituent treaty » and it is helpful to quote his definition *in extenso*:

A confederal treaty, however, is not a normal international treaty, it goes

⁴⁶ J. F. AUBERT, *Traité de droit constitutionnel suisse*, Neuchâtel, Ides et Calendes, 1967, vol. 2, along with many articles committed by this author, including that from which the epigraph of the present paper is drawn.

⁴⁷ A.V. DICEY, *Introduction to the study of the Law of the Constitution*, 1915, chap. III, rééd., Indianapolis, Liberty Fund, 8^{tho} ed., 1982.

⁴⁸ M. FORSYTH, *Unions of States: The Theory and Practice of Confederations*, New York, Leicester University Press, Holmes and Meier, 1981, p. 15.

⁴⁹ « This seems to me another way of saying that the contract at the root of a confederation is not a normal contract, but a constituent one – it constitutes something which is presupposed as having some kind of existence » (*ibid.*, p. 217, n. 15).

beyond a normal international treaty. It is, as already suggested, a « constituent treaty ». it constitutes a new body politic of which the partners to the treaty are henceforth « members » or, more precisely, « constituent units ». The partners, in other words, change their own constituted status in the making of the confederal treaty; they become parts of a new whole⁵⁰.

Here we find the influence of Carl Schmitt on the English political scientist, insofar as the federative compact is considered as an existential compact, one that changes the lives of the members deciding to try the federal adventure. This is why a jurist will here place the emphasis on the content of the agreement, the creation of a Federation, which must change the manner in which the « treaty » must be interpreted. It is a political agreement which oversets the political status of each member State⁵¹.

The second contemporary English speaking author I wish to quote is Nicholas Aroney (one of the co-organizers of this Symposium). In his brilliant book on the birth of the Australian constitution, he describes the movement of building colonies as an « enlargement of powers of self-government of the people », but movement does not mean that « sovereignty was now to rest with the people of the entire nation, without regard to the states into which they were organised⁵² ». There is a logic to aggregative federalism that imposes the conventional genesis of the constitution. Here again, Aroney explains very well that: « The basic assumption of Australian federation [...] was the original, mutual independence of the colonies. As a consequence, federation could only be founded on the unanimous agreement of the constituent states⁵³ ».

Naturally, it is important to note that the inherent feature of any aggregative Federation is to rely on the agreement of States deciding to share a political destiny. However, the most important aspect of Aroney's book is that it demonstrates in great detail that it is impossible for the content of the Australian federal constitution to escape from the constraint of the conventions surrounding it. In other words, *the formative process of the Federation determines the content of the constitution*. « The formative context operated as a presupposition in the deliberations of the framers so that the structure of the formative process shaped the particular representative structures, configurations of power and amending formulas that were ultimately adopted⁵⁴ ». Thus, in-depth analysis of the formation of the Australian constitution reveals that it is « better explained by reference to a mediating, con-

⁵⁰ M. FORSYTH, « Towards a new concept of Confederation », in M. FORSYTH, *The Modern Concept of Confederation*, European Commission for Democracy Through Law, Council of Europe, 1995, p. 63-64.

⁵¹ We take the liberty of referring here to our chapter on the metamorphosis from a « monade-State » to a member-State of a Federation (O. BEAUD, *Théorie de la Fédération*, *op. cit.*, chap. 6, p. 201-258).

⁵² N. ARONEY, *The Constitution of a Federal Commonwealth*, *op. cit.*, p. 338.

⁵³ *Ibid.*, p. 338.

⁵⁴ *Ibid.*, p. 339.

venantal interpretation⁵⁵ ». It is worthy of note that the founding fathers of the Australian federation clearly refused to build a federal Commonwealth in which the colonies, now Member States, would be totally subject to majority decisions taken by a sovereign federal Parliament. The essential nature of the Australian Constitution is clearly expressed in the conclusion to his book:

In sum, the Australian federation is a political community made up of political communities. The Commonwealth of Australia is a political community in which there are multiple loci of authority bound *together by a common legal framework which has been adopted by covenant*. The Constitution of Australia is, indeed, the constitution of a federal commonwealth⁵⁶.

Here the federal constitution is viewed as the result of a « covenant » which we refer to here as a « federal compact » in the sense of a constitutional compact.

Murray Forsyth and Nicholas Aroney underline the very close link between the federative compact and the foundation of the Federation that we could call a « constituted political entity⁵⁷ ». In this conference, we will not go into the details of the « dogmatic » (in the German sense of *Dogmatik*) of the federative compact, the particularity of which is to be an institutional compact, that is, it originates as a contract and operates, once concluded, as a set of rules or a law, and not as an easily terminated contract⁵⁸. We will merely attempt to prove the originality of the federative constitution (*the federative compact*) compared to the unitary constitution, by examining it, successively in terms of form – using therefore a criterion called « formal » by the jurists –, and then in terms of substance – a criterion called « material » by the jurists.

II. FORMAL SPECIFICITY, OR THE PECULIARITY OF THE FEDERAL COMPACT AS THE RESULT OF A CONSTITUENT PROCESS

In *Théorie de la Fédération* we insisted on the importance of the conventional genesis of the federative constitution. It stems from an agreement between Federated States. To demonstrate this we relied among others on the analysis of the Preambles to federative constitutions, past or present⁵⁹. In this conference, we wish to show the formal particularity of the federative compact by examining it in the light of the constituent power. So then we have to ask whether a Federation in fact could have its own particular constituent power. In our view, yes it does, since, in the case of a federative

⁵⁵ *Ibid.*, p. 343.

⁵⁶ *Ibid.*, p. 345.

⁵⁷ M. FORSYTH, « Towards a new concept of Confederation, », *op. cit.*, p. 64.

⁵⁸ Voir O. BEAUD, *La notion de pacte fédératif*, Frankfurt, Vittorio Klostermann p. 264-269.

⁵⁹ O. BEAUD, *Théorie de la Fédération*, *op. cit.*, chap. III, p. 105-130.

constitution, neither the holders of constituent power, nor the higher law-making process itself are the same as when constituting a State (so here the federative constitution is highly specific compared to the unitary constitution.).

A. *The holders of constituent power: plurality v. unity*

The federative compact is a « constitutional compact » the originality of which is that it is concluded between States acting here as constituent units⁶⁰. In that, it can be distinguished from the other category known in constitutional history, which is the constitutional compact concluded inside a State, between political authorities or social powers. This is how the compact between the Monarch and the assemblies of the XIXth century was described, in opposition with the constitution « granted » by the monarch alone⁶¹. However, the constitutional compact referred to when discussing the Federation is concluded not within a State, among political authorities, but between sovereign political authorities, that is to say, States that can be called either « monad States » or « federated States », as Jennings says, before they become member States of the Federation they have united to create⁶².

To undertake this demonstration, we must begin by making a slight detour into the general theory of the constituent power. By « constituent power », we mean the sovereign prerogative to determine the form of a political entity by means of a constitution⁶³, and not the power to revise the Constitution. The constituent power is the authority which, by drawing up a constitution, expresses a political will that suffices to validate it⁶⁴. It is the concept that enables this moment of « political foundation » of « a nation of citi-

⁶⁰ M. FORSYTH, « The Modern concept of Confederation », *op. cit.*, p. 63.

⁶¹ On this point, see C. BORGEAUD, *Établissement et révision des constitutions*, Paris, Thorin et fils, 1893.

⁶² For a more detailed analysis, see chapitre VI of our *Théorie de la Fédération*, *op. cit.*, p. 201 *sq.*

⁶³ Carl Schmitt proposes a definition which comes close to ours: « *The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.* The decision, therefore, defines the existence of the political unity in toto. The validity of any additional constitutional rule is derived from the decisions of this will » (C. SCHMITT, *Constitutional Theory*, 8, I, *op. cit.*, p. 125; *Verfassungslehre*, p. 75-76; French transl., p. 211-212).

⁶⁴ « *The constitution is valid by virtue of the existing political will of that which establishes it* » (*ibid.*, 3, I, p. 76; *Verfassungslehre*, p. 22; French transl., p. 152). In other words, it is the result of a fundamental political decision. « *Le pouvoir constituant est une volonté politique, c'est-à-dire un être politique concret. [...] Sans même savoir si la loi en général est par essence ordre ou rationalité, on peut dire que la constitution est nécessairement une décision et que tout acte du pouvoir constituant est nécessairement un ordre, un "acte impératif"* » (E. BOUTMY, *Études de droit constitutionnel : France, Angleterre, États-Unis*, chap. 8, I, 1, *op. cit.*, p. 212, (VI., p. 76).

zens⁶⁵ » to be described. The jurisprudence tries to explain the birth of a constitution by « political will », re-introducing into constitutional law a notion of legitimacy that is not taken into account in the dominant positivist doctrine due to the predominance of legality⁶⁶.

There is undoubtedly a magical or irrational dimension to this understanding of the constituent power as an originating one⁶⁷. However, this so-called irrationality of the constituent power actually corresponds to a political process during which, and at the end of which, a people becomes conscious of its political existence and asserts itself in opposition. The constituent power expresses the intense, historic moment or moments when the wish to live together crystallises, a founding moment that allowed Bruce Ackerman to distinguish, judiciously in our view, between « constitutional politics » and « normal politics »⁶⁸. His theory of higher law making, not least as set forth in the second volume of his *We the People*⁶⁹, gives his own illustration of the originality of the constituent power, a revolutionary power that gives birth to the Constitution.

Our working hypothesis comes from a slight shift and a generalisation, in the same way, in our view, that the unitary constitution is an act of the constituent power in a State⁷⁰, and in the same way that the federative compact is an act of the constituent power, but its main goal is to « constitute » a Federation and not a State. Consequently, application of the theory of the constituent power to the field of federalism, using the federative compact, supposes that we need to find *who* makes this constitution and also to wonder about the founding of the constitution of a Federation.

In the vast legal literature on federalism, which is in fact literature on the Federal State, the issue given rise to a dozen theories explaining its legal origin – the foundation, in the legal sense, – of the Federal State. Essentially, the dominant theory merely states that the constitution (of a Federal State) is the *unilateral* work of that Federal State, and therefore that it is a constitutional law that the State lays down for itself. Using this tool, the jurists explain both federalism by aggregation and federalism by dissociation or segregation (« Devolution » in English). In the latter case, a unitary State

⁶⁵ See, for instance, U. PREUB, « Der Begriff der Verfassung un ihrer Beziehung zur Politik », in U. PREUB (dir.), *Zum Begriff der Verfassung. Die Ordnung des Politischen*, Frankfurt, Fischer, 1994, p. 29.

⁶⁶ For a synthesis from a legal standpoint on this question, see mainly: C. KLEIN, *Théorie et pratique du pouvoir constituant*, Paris, PUF, 1995.

⁶⁷ On this point, one might bear in mind Claude Klein's thought-provoking contention that constituent power is « a system of magical legitimisation » (C. KLEIN, *Théorie et pratique du pouvoir constituant, op. cit.*, p. 194).

⁶⁸ This distinction is made in B. ACKERMAN, dans *We the People. The Foundations*, Vol. 1, Harvard, Belknap Press, 1991.

⁶⁹ B. ACKERMAN, *We the People*, Harvard, Belknap Press, 3 vols, 1991 à 2014. For the analysis of constituent power, see in particular vol. 2: *Transformations* (1998).

⁷⁰ That is the claim made in the publication drawn from my doctoral Thesis: O. BEAUD, *La Puissance de l'État*, Paris, PUF, 1994.

loosens its centralised stranglehold on certain regions aspiring to greater autonomy, by agreeing to federalise, to « become » a Federal State. The constitution is accordingly amended to produce this federalisation. However, it is not at all the case of aggregative federalism, which is the subject of our *Théorie de la Fédération*⁷¹, since there existed nothing before these Federations, except isolated, particular States, which we called « monad States » and which here we will call federating States, that decide to unite in a Federation by making a compact with other States with a view to constituting a new political being, a federal being. The prevailing jurisprudence ignores this special case and behaves as if aggregative federalism can be analysed in the same way as dissociative federalism. Well, the great French constitutional scholar Léon Duguit roundly denies this, vehemently listing the inconsequences it leads to:

The (federal) constitution is said to be the result of the federal wish. Now, before the federal constitution was made, there was not yet a Federal State. It is therefore a Federal State that did not yet exist which drafted its own constitution; and the federal constitution emerged from nothingness and determined the scope of action of the central government and member states. The vicious circle is clearly visible. What fixes the respective scopes of activity of the Federal State and the member States? The federal constitution. Who makes the federal constitution? The Federal State. When does the Federal State come into existence, with its powers relative to those of the member States? Only when the federal constitution is completed. It cannot be the Federal State that makes the constitution, since that State comes into existence only once the constitution is completed⁷².

Therefore, he argues, it is absurd to claim that the Federal State founds its Constitution by means of a law, since it does not yet exist at the time the constitution has founded it. We must escape from this vicious circle of « self habilitation » of the Federal State, that Duguit has rightly identified and condemned. We must therefore seek another explanation for the birth of the federative constitution. The historic approach, which examines how Federations are born in practice, with what procedure and with which players, is in our view the means of explaining it better. It should not be ignored simply because the jurist has no business looking at the genesis of constitutions for the purpose of « dogmatically » analysing them⁷³. If we use this historical perspective, there is no doubt that the Federation is specific in that its genesis is conventional: its founding act, the federative compact, is the result of an agreement between several players in the process leading to the formation of the Federation. In this respect, it seems to us that Carl Schmitt's intuition should be examined more closely. In his *Constitutional Theory*, he

⁷¹ See here the distinction between Aggregation, Devolution, and Coercion, made by Nicholas Aroney.

⁷² L. DUGUIT, *Études de droit public*, t. II, Paris, A. Fontemoing, 1903; L. DUGUIT, *L'État, les gouvernants, les agents* [1903], Paris, Dalloz, 2004, p. 676-677 (emphasis added).

⁷³ Among many examples: « *Le juriste n'a pas la même tâche que l'historien. Il ne recherche pas comment l'Etat s'est développé, il l'étudie comme il est* » (E. BOREL, *État et souveraineté*, thèse droit, Lausanne, 1886, p. 70).

claims, first, that « its conclusion is an act of the constitution-making power⁷⁴ ». Thus the constituent power can act to constitute a Federation as well as a State. According to the second definition, « a genuine constitutional contract presupposes at least two parties that already exist and will continue to exist and each of which contains internally a subject of a constitution-making power. Therefore, it is a political unity. A genuine constitutional contract is a federal compact (*Bundesvertrag*)⁷⁵ ». The basic political entities are thus retained in a federation, but as far as we are concerned, such a compact comes from several subjects in the constituent power. It is precisely this plurality that sheds light on one of the specific features of the federative compact: there is not just one holder of the constituent power – the nation or the people – but *several*: they are the confederating States or, if you wish, the peoples that confederate (in a federal republic).

The plurality stems from the very idea of Federation: the federative pact is designed above all as an act demonstrating the freedom of these States to undertake the federal adventure. Thus the legal expression of « federative freedom⁷⁶ ». This freedom means that the federal union is a deliberate one, and that it presupposes the autonomous wish of the member States, as in marriage, in modern societies, supposes the expression of the future spouses' free will. This decisive point did not escape the Australian constituent assembly since one of the most brilliant Founding Fathers of this Republic, law professor John Quick, described the federal Constitution as « deliberately adopted⁷⁷ » by the federated political communities. The reverse empirical proof can be seen in the « forced federalism » of federations imposed by force when federative compacts are extorted from uniting political entities⁷⁸.

Consequently, the federative compact results from *a political act of self-determination* since, by creating a new political entity, the Federation, it illustrates the wish of the federating States to assert themselves politically;

⁷⁴ C. SCHMITT, *Constitutional Theory*, § 29, II, 3, p. 385.

⁷⁵ *Ibid.*, § 7, II p. 197.

⁷⁶ See O. BEAUD, *Théorie de la Fédération*, *op. cit.*, chap. 3, p. 117-118

⁷⁷ « A political federation may be defined as a permanent union for general purposes, of neighbouring related and homogeneous political communities, having an identity of interests and sympathies, under one Supreme Constitution, *voluntarily adopted*, in which there is a partition and appropriation of the totality of Sovereign Powers, provision being made for a representative National Government exercising all those powers and functions which concern the nation as a whole, and, at the same time, for the continuance of the local independence, local self-government and internal sovereignty of the several states » (J. QUICK, *Digest of Federal Constitutions*, Bendigo, Bendigo Branch of the Australian Natives' Association, 1896, p. 10).

⁷⁸ We have attempted to demonstrate this through the case of the federative constitutions imposed by Napoleon upon the Switzerland the Confederation of the Rhine in the following article: O. BEAUD, « Federation and Empire. About a Conceptual Distinction of Political Forms », in A. LEV (dir.), *The Federal Idea: Public Law Between Governance and Political Life*, Hart Publishing (forthcoming 2017). The expression « *forced federalism* » as applied today to amerindian tribes does not appear to carry the same meaning.. However, see on this latter question: J. CORNTASSEL, R. WITMER, *Forced federalism: Contemporary Challenge to Indigenous Nationhood*, Norman, University of Oklahoma Press, 2008.

but doing it differently from what a sovereign State would do. Most often, formation of the new political being, the Federation, coincides with the drafting of the constitution setting it up. This is not always the case for federative compact, not least where the compact is re-founded, once the Federation has been set up (see *infra*, II, A 2).

One further remark must be made: in a federative compact, the holders of the constituent power are the federating states, and so it is deemed, necessarily, that the political question of the physical holder of the power (be it the monarch, the parliament or the people) is *secondary*. In the United States, the omnipresence of the notions of people and sovereignty of people in the constitutional debate has blurred the broader view: there can be federative compacts in which the people was not called on to take a decision, such as Switzerland in 1815 or again Germany throughout the XIXth century, from 1815 – the *deutsche Bund* – to 1871, the second Reich. However, even taking into account the position of federal republics, it remains a fact that when a Federation is created, there is not, historically speaking, a single people, the federative people (here, that of the United States), but a sum of peoples, those of the federating states, that decide to unite to form a new political entity. In other words, the federative people is a *compound people*⁷⁹. Thus, even in a Federal Republic, we must talk of a plurality of subjects of the constituent power if we wish to describe the political holders of that power properly.

In sum: the first original feature of the federative compact is the plurality of holders of the constituent power. The second original feature is the direct consequence of that plurality and can be perceived in analysing the constituent procedure.

B. The Constituent Procedure⁸⁰

As a legal act, it is adopted at the end of a procedure, which I shall call a « constituent process », during which several votes are cast. The mode of adoption of the federal compact then requires that decisions should be taken. But how? I suggest here that a Federation requires unanimity insofar as each individual state, which becomes a member state, first expresses its *sovereignty* by « founding » a Federation – that is, by « co-founding » it – and aims at keeping its sovereignty after the federal entity has been formed by retaining its freedom of decision.

⁷⁹ If we might refer to another of our articles: O. BEAUD, « Das Volk in einem Bund », in H. BUCHSTEIN, C. OFFE, T. STEIN (dir.), *Souveränität – Recht – Moral. Staatsgewalt im Zeitalter der offenen Staatlichkeit*, Frankfurt, Campus, 2007, p. 82-91.

⁸⁰ For a more detailed analysis of the following elements, see our previously published article: O. BEAUD, « The Issue of Majority in a federal System. The particular Cases of Constituent Power and of Amendment of the Federal Compact », in S. NOVAK & J. ELSTER (dir.), *Majority Decisions. Principles and Practices*, Cambridge University Press, 2014, p. 56-76.

Let it me say that I rely here on an acute observation by Jean-François Aubert, the great Swiss constitutional law expert. He noted accurately what makes the specificity of the federal compact: it has « two natures, *a legal one and a contractual one*⁸¹ », and then, he added this intriguing remark:

The situation is not exactly the same when one considers the formal constitutions whose adoption coincides with the creation, by means of the association of preexisting states, of a *federation*. Whereas one cannot expect from a people that all the inhabitants of a country agree with their Constitution, one may, in the case of states which are federating make it a condition of the formation of the new federal state that all the members of the future entity have given their assent to be part of it, that all of them have accepted the new Constitution⁸².

In the author's mind, this passage is used to show the partly contractual character of the federal constitution. But for us, its interest lies in the fact that it points to the quantitative difference that exists between the two procedures of adoption of the constitution. In the federal case, the relatively low number of « federating » states that must « consent » to the constitutional compact is very small when compared to the millions of votes in a referendum on the constitution in a unitary state. Since it is possible, therefore, to require that *all* states agree, the *unanimity rule has practical significance* so that, technically speaking, it is possible to use it to adopt the founding act of a Federation of a modern democratic state.

However, the notion of federative compact must be distinguished. There are mainly two types of founding compacts. The first important distinction to be made between them depends on the question of whether they create a Federation *ex nihilo* or whether, on the contrary, they are concluded when there already exists a Federation, which of course implies a continuity of the federal institution. The compact which creates *both* the Federation and its form of government will be called a « *founding compact* ». It creates a new political form – a federal one – as well as a new form of government which determines the constitutional organisation of the federation. Some historical examples of this in modern times are the Union of Utrecht (1579), which created the United Provinces, the Articles of Confederation in the United States (1781), the British North America Act (1867), the Australian Constitution (1900) or the act which created the German Confederacy (1815).

Once the Federation has been founded however, it may happen that, as in the case of a state, the decision is taken to *change* its constitution (and not to *modify* it). We call such an act a « *re-founding* » compact insofar as the constitution of the Federation is really *changed*, and *not only amended*. The modification of the compact results from the exercise of a constituent power insofar as those on whom such power is conferred authorise themselves to reconfigure the political entity they have created. This so-called « *re-founding* » compact is different from the founding pact in that there is an

⁸¹ J.-F. AUBERT, « Notion et fonctions de la Constitution », in D. THURER, J.-F. AUBERT, J. P. MULLER (dir.), *Verfassungsrecht der Schweiz. Droit constitutionnel suisse*, op. cit., p. 8.

⁸² *Ibid.*

existing Federation in place, so that it does not create the Federation. The re-founding act can be explained by the extent of the change that has been made. A re-founding compact aims at changing the type of relations between the federation and the member states as well as the form of the federal government. It « re-founds » the Federation since it gives another configuration to the constitutional structure of the federation.

Moreover, that « re-founding » compact is original in that it is the result of an illegal procedure, even as it creates a new constitutional legality. On that point, it is also different from the revision of the federal compact, for the « re-founding » compact takes the place of the new one in an illegal manner, that is by not respecting the « legal » way of amendment or, in some cases, not even taking account of the fact that legal amendment is not possible. As such illegality always points to the presence of a constituent phenomenon, the formally revolutionary move from one federal compact to another proves that a constituent process is at work. At least two major federal countries – the United States and Switzerland– have gone through such a revolutionary change, in 1787 and 1848 respectively.

I will not enlarge on this question, but it is worth noticing that, in practice, the rule of unanimity is not always respected. The majority rule is sometimes applied as an exception (an extreme case). It is, first, when a draft federal constitution was adopted by the constituent Diet *by the majority*, and not unanimously (for instance, Switzerland, 1815). In the case of ratification by federate authorities (Member States), the study of constitutional practice reveals deviating cases, *i.e.* the application of majority rule. In other words, the constitutional history of the Federations teaches us that *there have been attempts to avoid or bypass the unanimity rule*, so as to avoid the veto of some minority states. Here, once again, the examples of the United States (1787-1789) and of Switzerland are our models. In the first case, it has quite rightly been remarked that the disposition of Article VII amounted to inventing a « rule which allowed to count the ratifications that could bind the thirteen states together by means of a mode of counting which excluded unanimity⁸³ ». In the second example, the Swiss case of 1848, it is also well known that six out of twenty-two cantons rejected the draft of the constitution. I will avoid, here, the legally delicate issue of how the minority cantons, which refused the constitution, are deemed to be the authors of a constitution they explicitly rejected, or refused to vote for.

If I try to sum up, the federative compact case reveals a new case for arguing in favor of the peculiarities of constituent power and reveals, at the same time, the peculiarity of a constitution of a Federation, if you look at its origins. Let's turn to the content of this particular constitution.

⁸³ S. BEER, *To Make a Nation. The Rediscovery of American Federalism*, Cambridge, Harvard University Press, 1993, p. 331.

III. THE « MATERIAL » SPECIFICITY OF THE FEDERATIVE COMPACT

The thesis defended here argues that the particular nature and structure of the Federation necessarily influences the content of the constitution that governs them, that is to say, the federative compact. In other words, the constitutional material (or content) is not at all the same between a unitary constitution and a federative one. Now, this importance of the material criterion – the *rationae materiae* criterion – is systematically played down by the positivist jurisprudence, obsessed with the idea of the Constitution's value, that the Constitution is superior to ordinary law, thus giving rise to the idea of judicial review. The same dominant doctrine transposes into the federal constitution the classic idea that the Constitution is a constitutional law, formalised in a *written* document, the main purpose of which is to share power between the various State institutions, protect individual rights and safeguard the separation of powers. It is thus the constitutionalist dimension of the idea that leads to the description of federalism as a new form of separation of powers, a so-called « vertical » separation between the Federation and the member States.

However, this application of the twofold formalist and constitutionalist model of the unitary constitution to the federal structure does not work, for the simple reason that the content of the constitution of a Federation is necessarily different from that of a State constitution. Our thesis is that the constitution of a State and that of a Federation are very heterogeneous in content, that is, the constitutional material. A Federation's constitution materially differs from a unitary constitution because it organises and shares the power between the Federation (F), the member States (MS) and individuals (I) subjects of this twofold power. It must take account of the triangular structure of all federations (F, MS and I). In other words, because the structure of the power in a Federation is different from that in a State, the federative Constitution that reflects the structure of the power it governs necessarily has a specific content. We will demonstrate it here in two different ways, even though there are many others. First we will examine the global content of a federative constitution and secondly, we will highlight the importance of the two originating clauses in every federative compact. Due to lack of space and time, we will spend less time on the latter.

A. Overall Analysis of the Content Using an Imaginary Federative Constitution

The simplest way to describe the specificity of a federative constitution would be to compare the content of the canonic texts of the federative constitutions – the USA, Switzerland, Germany, Canada, Australia, Brazil, India etc. – compared to that of the unitary constitutions. However, we have chosen here to study the case, too often ignored in our view, of a « doctrinal » federative constitution, that is, one imagined by a professor. It is the draft constitution for a federal Europe proposed in 1940 by Ivor Jennings, the great English constitutionalist, in his work *A Federation for Western Eu-*

rope⁸⁴. This book seems to us too often ignored, despite offering extraordinarily suggestive material for understanding what a federative Constitution is. His summary enables the federal issue to be best thought out.

First of all, a reminder of the political circumstances of the book. Ivor Jennings, a left-leaning constitutionalist lawyer, was contacted by Patrick Ransome, a member of a pacifist organisation called *Federal Union*, which, under William Beveridge, wished to set up a project of federal union of the Western European democracies⁸⁵. Jennings agreed to participate in this enterprise but he decided to publish the results of his own study independently, in *A Federation for Western Europe*, which ended with the draft of a federal constitution. Jennings was particularly anxious to achieve a feasible project⁸⁶. In any case, after reading the preface and its contents, the reader understands that in 1940, Jennings had drafted a constitution for a European federation for the purpose of combating Nazi Germany. Although this political context is decisive, the interest of this book lies in the fact that all the grounds for drafting a European Federal Constitution – every chapter of the book⁸⁷ – are juxtaposed with the Appendix containing the draft Constitution itself.

Jennings begins by setting out the classic purpose of any Federation, that is, to establish peace between the member States. In practical terms, the project feeds into « the perpetuation of European peace⁸⁸ ». He goes on to explain that a modern Federation owes it to itself to be democratic, and so he examines the composition of the member States (should one, for instance, include the Italian and Spanish dictatorships?) and then, in the main part of the book, he examines what should be the subject of a federative constitution. It is why he carefully details his conception of what a « federal government » should be and also what areas should be within its scope of power – defence, foreign policy, the economy – and finally, the judicial resolution of disputes. The reader also understands that Jennings wishes to combine the future European Federation with the *British Commonwealth*⁸⁹ –

⁸⁴ I. JENNINGS, *A Federation for Western Europe*, *op. cit.*, 1940.

⁸⁵ I. JENNINGS, *The Road to Peradeniya*, Colombo, Lake House Investments, 2005, p. 66. He describes the genesis of his book in the preface of *A Federation for Western Europe*, *op. cit.*, p. VII-XI.

⁸⁶ He is insistant that he pondered « the possibility of providing a constitution which does not demand too great a sacrifice from the federating states, which does however solve the major European problems, and which will work when it is established » (I. JENNINGS, *A Federation for Western Europe*, *op. cit.*, p. 2).

⁸⁷ The chapters of the book are as follows: « I. The Purpose of a Federation; II. A. Democratic Federation; III. The British Commonwealth of Nations; IV. Colonies; V. Federal Government; VI. The Federation and the States; VII. Defence; VIII. Foreign Policy; IX. A European Economy; X. Judicial Settlement of Disputes; XI. A Practicable Scheme » (*ibid.*).

⁸⁸ I. JENNINGS, *A Federation for Western Europe*, *op. cit.*, p. 12. The very first chapter deals with « The Purpose of a Federation ».

⁸⁹ This project, published as an appendix to the book (*ibid.*, p. 160-188), contains 23 articles, along with 3 supplementary articles.

leading to a rather long analysis of the situation of the colonies in the British Empire. Similarly, there is no surprise when we discover that the institutions of this democratic Federation, comprising the thirteen States in Western Europe – are modelled on those of Westminster⁹⁰. In sum, it is an English project to create a European Federal constitution. These are the two most idiosyncratic aspects of the work, revealing the author's dependence on the Anglo-British context⁹¹.

Apart from these two atypical aspects, most of Jennings' developments describe classic components of any federative constitution. In the part laying out the grounds for this federative constitution, there is *typically federal* reasoning, in the sense that he tries to pinpoint the uniqueness of a constitution for a Federation. It is demonstrated by three significant facts.

- First, Jennings examines the powers that should be granted to the future Federation: defence, foreign policy and the international part of the economy.

- Then, he examines the federal constitutional mechanism, describing the relationships the future member States will be required to have among themselves and with the federal government.

- Finally, most importantly, he drafts « a Rough Draft of a Proposed Constitution for a Federation for Western Europe » which enables the material specificity of any federative constitution to be better apprehended.

We will first and foremost examine the text of this draft Constitution. Like the grounds, it contains parts that are common to both unitary and federative constitutions. For example, Jennings merely transposes to the federal level the institutions already present in the nation States: the executive, the legislative and the judiciary in two branches, with just one nuance which is a second federal chamber, the « State's House » (Art. X) – and he constructs a kind of parliamentary federalism following the Canadian or Australian models.

For our purposes, the most important is that there are elements that show the originality of this imaginary federative constitution. The first specific feature occurs in the first article of this *draft of Constitution*, soberly entitled « *The Federation* ». It provides for naming the Federation and designating its members⁹². This denominating operation, a performative act *par*

⁹⁰ His idea is to integrate certain colonies of the British empire into the European Federation, while treating others as « dependencies » of the Federations.

⁹¹ The goal is indeed to create a European Federation, but also to replace to old Commonwealth by a federal European and Anglo-colonial organisation.

⁹² The Federation of Western Europe (hereinafter called « the Federation ») is a federal union composed of such States (hereinafter called « the federated States ») as shall have ratified this Constitution in accordance with this Article.

Any of the following States shall become a federated State on giving notice to Her Majesty the Queen of the Netherlands that it has ratified this Constitution: the German Reich, Belgium, Denmark, Eire, Finland, the French Republic, the United Kingdom of Great Britain and Northern Ireland, Iceland, the Grand Duchy of Luxemburg, the Kingdom of the Netherlands, Norway, Sweden and the Swiss Confederation.

excellence, is typical of the creation of a Federation. For it to exist, it has to be named⁹³. Not only that the members of the Federation must be determined (its composition) and the procedure for admission where the Federation is enlarged to include new members joining the founders must be laid down. Provisions such as these, found in most positive federative constitutions, do not exist in unitary constitutions. There is no admission procedure for a Federation in a State that does not seek to attract « associate » members, as Montesquieu called them⁹⁴. Similarly, in a State constitution, there is no provision for the composition of the political entity since everyone knows that a State is composed of a population, a territory and a government. All unitary constitutions are based on the presupposition of a united State that creates them. Look at the innumerable French constitutions that, most of the time, begin by stating that the people or the nation are sovereign.

The other exclusively federative provisions or clauses are as follows. First, there are those providing for the relationships between the Federation and the member States: thus, the Federation must safeguard the existence of the member States, a protection rule that is a classic feature of federal constitutions, along with provisions for federal intervention and execution. However, the Federation cannot exclude a selected member State, which is the strongest guarantee of the constitutional autonomy of the federated States⁹⁵. Other very important provisions concern *federal citizenship*. This is in fact a « double nationality » since the member of any member State is necessarily a member of the Federation – (Art. IV)⁹⁶. The corollary of this provision is that all the citizens of one member State must be treated equally with those of other member States when they find themselves on the territory thereof⁹⁷. Finally, the project of course grants jurisdiction in litigation between the Federation and the member States to the federal judiciary (see *infra*, B)⁹⁸ and provides for collaboration between the federal and fed-

⁹³ This question was expounded in chapter IV (« Comment dénommer une Fédération ») of our *Théorie de la Fédération, op. cit.*, p. 131-153.

⁹⁴ See our chapter entirely devoted to the admission of new member-States (*Ibid.*, Chap. VII, p. 233 *sq.*).

⁹⁵ Art. I, 4: « A federated State named in section 2 of this Article may not be expelled from the Federation nor shall it withdraw from the Federation, except by an amendment of this Constitution ».

⁹⁶ Art. IV, 2. « All citizens of the federated States shall also be citizens of the Federation, and are hereinafter referred to as “federal citizens” provided that, British subjects who are citizens or nationals of a British Dominion which is not a federated State or who, being domiciled in a British Dominion which is not a federated State, do not indicate to the Government of that Dominion within one year from the establishment of the Federation that they wish to become federal citizens, shall not federal citizens » (I. JENNINGS, *A Federation for Western Europe, op. cit.*, p. 163-164).

⁹⁷ Art. IV, 5: « Federal citizens within a federated State, not being citizens of that State, shall have the same rights and duties as citizens of that State: provided that the laws of the State may ». On the importance of this principle, see Chr. SCHÖNBERGER, *Unionsbürger*, Tübingen, Mohr, 2006.

⁹⁸ « Art. XXII – THE FEDERAL JUDICIARY:

erated entities when amending the Constitution (Amendments)⁹⁹. Clearly, Jennings has not neglected the importance of the relationships between the federal and federated instances, as illustrated by Woodrow Wilson's remark: « The question of the relation of the States to the federal government is the cardinal question of our constitutional system¹⁰⁰ ». This cardinal aspect can be explained by the simple fact that any Federation is characterised by the co-existence of two types of political entity: the federal and federated entity. The duality is thus reflected in the text of any federative constitution.

Furthermore, the provisions concerning relationships between the member States are just as federative in spirit. The States can conclude agreements and treaties between themselves under the guidance of the federal institutions, in fields where federal power does not, or does not yet, exist¹⁰¹. Provisions like these express what is known as « horizontal federalism », which is particularly prevalent in the United States Constitution, as recently demonstrated by Joseph Zimmerman¹⁰². These so-called horizontal relationships are decisive, because they show the ongoing equality existing between

1. There shall be a Federal Supreme Court which shall have original and exclusive jurisdiction in

- (A) All disputes between any two or more federated States.
- (B) All disputes between a federated State or federated States and the Federation.
- (C) Prize.
- (D) Piracy on the high seas; and
- (E) Such other matters within the competence of the Federal Legislature as that legislature may prescribe [...]

⁹⁹ Art. XXIII – « Amendments to this Constitution may be prepared in either House, and any such amendment shall take effect if it is supported by at least two-thirds of the members voting in each House [and by a majority in the legislatures of two-thirds of the federated States?]: provided that the proportional representation of a federated State in the States' House shall not be diminished without the consent of the legislature of that State, nor shall this Article be so amended as to enable the proportional representation of a federated State in the States' House to be diminished without the consent of the legislature of that State ».

¹⁰⁰ W. WILSON, *Constitutional Government in the United States*, New York, Columbia University Press, 1908; reprint: Transaction Publ., New Brunswick, 2002, p. 173.

¹⁰¹ « Art. XIV – RELATIONS BETWEEN FEDERATED STATES

1. A federated State may make treaties or otherwise contract obligations with any other federated State in relation to matters which are not within the exclusive competence of the federated State nor withdrawn by this Constitution from the competence of the federated State, but such treaties or arrangements shall be of no effect unless they are signed or ratified on behalf of the President as well as signed or ratified on behalf of the federated State.

2. Where the treaty or arrangement under section 1 of this Article so provides, the Federal Legislature shall have power to make laws to give effect to the treaty or other arrangement or any part of it.

3. Treaties and other arrangements between federated States in operation at the establishment of the Federation shall continue in force until they are abrogated in accordance with their terms, or until they are declared by the Federal Legislature to be inconsistent with this Constitution ».

¹⁰² « The U.S. Constitution, as explained in this volume, creates a constitutional interstate web holding the economic union and the political union together by means of the interstate commerce, full faith and credit, privileges and immunities, interstate compact and rendition clauses » (J. ZIMMERMAN, *Horizontal Federalism. Interstate Relations*, New York, State University of New York Press, 2010, p. 1).

States that have become members of the same group. The same type of relationships does not exist in a de-centralised unitary State, this is a marked distinction between the federative and unitary constitutions.

Finally, the provisions relating to the allocation of powers (or jurisdictions – « *Kompetenz* in German », « *compétence* » in French) are typically federative. All federative constitutions must necessarily provide for the sharing of power between the Federation and the member States. This is the « political question par excellence » (Kelsen) in a Federation. Most legal analyses begin by examining this sharing of powers: who does what? In other words, what can the Federation do and what can the member States do? In these two questions, the implicit understanding of « do » is « to legislate », and that is a mistake, because the sharing of powers between the Federation and the member States also concerns the executive and the judiciary¹⁰³. Jennings places little importance on this in his explanations¹⁰⁴, but he goes into more detail in his « *draft of Constitution* ». He deems the Federation to have only the powers expressly conferred on it while the member States have common law powers, thus repeating the classic provision that « The powers not exclusively vested in the Federal Legislature by this Constitution nor withdrawn by it from the federated States may continue to be exercised by the federated States » (Art. XI, 3). However, his codification takes account of changes in the case law of the US Supreme Court and in Canada¹⁰⁵. The only original element is in procedure, where he provides for « annulment » of a federated law contrary to the federal constitution by the President of the Federation. He calls this the right to disallow, probably based on Canadian law¹⁰⁶. The draft constitution then goes on to list the

¹⁰³ A question we examined in our previous article: O. BEAUD, « The Allocation of Competences in A Federation: a General Introduction », in L. AZOULAI (dir.), *The Question of Competence in the European Union. Vertical Divisions of Powers and the Federal Vision*, Oxford, Oxford University Press, 2014, p. 19-38.

¹⁰⁴ Which he evokes briefly at the beginning of Chapter VI, « The Federation and the States » (see I. JENNINGS, *A Federation for Western Europe*, *op. cit.*, p. 93-94).

¹⁰⁵ « Art. XI – GENERAL LEGISLATIVE POWER

1. The Federal Legislature shall have power to make such laws as may be necessary and proper for carrying into execution the powers of the Federation or of the Federal Legislature or other federal institution or officer under this Constitution.

2. The Federal Legislature shall have power to authorise the application of federal funds for the general welfare of the Federation.

3. The powers not exclusively vested in the Federal Legislature by this Constitution nor withdrawn by it from the federated States may continue to be exercised by the federated States; but when a law of a State is inconsistent with a law of the Federation the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

4. In this Constitution, “rights” include powers, privileges and immunities, and “duties” include liabilities ».

¹⁰⁶ « Art. XIX

1. Where under this Constitution the President has a power to disallow State legislation he shall have power also to disallow administrative acts of the same character; and such power may be exercised within a period of three months from the enactment of the legislation or the coming into operation of the administrative act. Any such disallowance shall be notified by the President by proclamation, and the legislation or administrative act shall, from the date of the proclamation, cease to be law.

main powers transferred to the Federation: external relations (Art. XIII): defence (Art. X), interstate commerce and migration (Interstate and Migration, Art. XVIII), external trade (External Trade) (Art. XV), and the economic powers of the Federation (Art. XX)¹⁰⁷.

This constitution imagined by Professor Jennings suffices to highlight how much a federative constitution differs from a unitary one, in content alone. Above all, it confirms the instrumental nature of any federative compact: it is a means of realising the federative ideal or the purpose of a Federation. The federative compact complies with this instrumental rationality (*Zweckrationalität*), discussed by Max Weber. Analysis of its content reveals that it cannot be thought without knowing the *telos* of the Federation¹⁰⁸, or again what Jennings calls the « purpose of the Federation ». In other words, the federative compact must be understood as the legal expression of a federative ideal which is not a constitutionalist ideal. It is indeed why Jennings explains that there is no necessity to include a Bill of Rights in his draft of federal constitution¹⁰⁹.

B. The Two Originating Clauses of Any Federative Compact

We have seen that the federative compact is characterised materially by a series of provisions or clauses existing in no other type of unitary constitution. But we would like to highlight two types of clause among them that are qualified not only as typically federative, but also as originating – « *Urklause*n » as the Germans would say. They can be found in the oldest federative compacts, those prior to state modernity, be they from Antiquity or especially the Middle Ages (in the Swiss Confederation for example).

2. Without prejudice to other powers set out in this Constitution, the President shall have power to disallow any law of a federated State which, in the opinion of the Council of Ministers,

- (A) Tends to interfere with the freedom of elections to the People's House; or
- (B) Tends to prevent the for nation or constitutional operation of political parties having federal objects; or
- (C) Is likely to require the performance by the Federation of its obligations under Article III of this Constitution ».

¹⁰⁷ « Art. XX – OTHER ECONOMIC POWERS

1. The Federal Legislature shall have power to make laws relating to
 - (A) Currency, coinage and legal tender.
 - (B) Banking, inter-State payments and the transfer of securities.
 - (C) Weights and measures.

2. In the exercise of any power under this Article the Federal Legislature shall be entitled to declare that its power is exclusive ».

¹⁰⁸ See O. BEAUD, *Théorie de la Fédération*, *op. cit.*, chap. IV: « La nature contradictoire du telos fédératif », p. 261 *sq.*

¹⁰⁹ I. JENNINGS, *A Federation for Western Europe*, *op. cit.*, p. 101-102. We have highlighted the non-necessary character of a Declaration of rights in a Federation elsewhere: « Droits de l'homme et du citoyen et formes politiques. Le cas particulier de la Fédération », *Revue universelle des droits de l'homme*, 1-4, 2004, p. 16-26.

They are, first, the mutual assistance clause and second, the federal arbitration clause.

1. The Mutual Assistance Clause

In a federation, the member-States are bound to assist each other when at least one State feels or is under threat to its safety. This obligation is set forth in the written compacts in the form of a clause of mutual assistance that used to be known as « confederal assistance » and that today's legal treatises call federal assistance. It binds the confederated States to mutually assist each other, as noted by Pufendorf¹¹⁰. Today, in contemporary federations, this obligation of mutual assistance does not appear so clearly, because growing federal institutionalisation has led to a position where it is not the member States that are in the firing line but the federation. Indeed, we no longer refer to the « mutual assistance » that they should give each other but to the « federal guarantee » (singular or plural) when referring to the assistance that the Federation should provide to a member State in serious difficulty. Despite this, mutual assistance remains the basis for any federal compact, for a systemic reason. This mutual assistance clause – « pledge of mutual assistance », as Forsyth calls it – is the means by which the goal of federal security is achieved, one of the central features of the federative *telos*. Also, in its own way, it expresses a feature characteristic of all federations, which is solidarity between member States, the federated units, which link their political fates by undertaking to defend each other mutually. Even more than federative loyalty (*Bundestreue*), that of the member States is an undertaking towards the other confederated members, their « confederate brothers » as the Swiss put it as recently as the XIXth century. There is therefore a systematic link between mutual assistance and the Federation that we would wish to describe in historical terms, because in fact, *any federal compact flows from a mutual assistance compact*.

2. The Federal Arbitration Clause

The second example of a typical clause of a federal compact is the peaceful settlement by arbitration rather than by unilateral force. The arbitration mechanisms is here meant to prevent war between member states. As Forsyth writes,

In the classical confederation, the mutual guarantee of territory and independence, and the agreement henceforth to exercise the right of war joint through a common organ, are fundamental: the agreement to settle disputes between these partners by arbitration follow from them, as a conclusion flows from a first proposition¹¹¹.

¹¹⁰ S. PUFENDORF, *Du droit de la nature et des gens*, VIII, 9, § 6, t. II, p. 487.

¹¹¹ M. FORSYTH, *Union of States*, *op. cit.*, p. 196.

It is a crucial issue in a federal system: the modes of settlement may be judicial or political, or a combination of the two. We might think of course of the *judicial* settlement with the Constitutional Court which decides the territorial conflict between federate authorities. There are many important decisions of the Supreme Court of the United States in the XIXth century which establish this intrinsic link between the federal clause and the prohibition of war between Member-States¹¹². To some extent, constitutional justice stemmed historically from the necessity to find a peaceful settlement to potential disputes among member States¹¹³. But it was in many countries a *political* institution which could have been competent: the case of the Bundesrat (1871) is very illuminating for this kind of political settlement.

CONCLUSION

We have here presented an overall thesis: the constitution of a Federation may be described as a federative compact and must, in our view, be thought of as different from a unitary constitution. We have endeavoured to demonstrate this specificity of the federative constitution using two criteria: formal and material. However, it should be added that other elements giving rise to, or defending, this thesis, have not been dealt with here, because it is impossible in a conference to cover as much as in a book. We have therefore left aside at least three other important cases: the special relationship between the federal constitution and the state constitutions; the federative oath – which backs up the notion of contract inherent in the formation of a federative compact – and the institutional dimension of the compact which, born as a contract, can be read, once instituted, as a law or regulation. However, we hope that we have contributed a few convincing arguments, or at least some that are worthy of discussion, in favour of the idea that jurists might consider the Constitution of a Federation differently.

Olivier Beaud

University of Panthéon-Assas (Paris II), Institut Universitaire de France

¹¹² For instance, *Missouri v. Illinois*, (180 U.S. 208); *Kansas v. Colorado* (185 US 125). See the very convenient book of J. BROWN SCOTT, *Judicial settlement of controversies between states of the American union; an analysis of cases decided in the Supreme court of the United States*, Oxford, Oxford Clarendon Press, 1919 (2 Vol.).

¹¹³ For a demonstration of this last point, from a historical standpoint, see our article: O. BEAUD, « De quelques particularités de la justice constitutionnelle dans un système fédéral », in C. GREWE *e. a.* (dir.), *La justice constitutionnelle*, Paris, Dalloz, 2005, p. 49-72.